Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C. § 160(c)	)	WC Docket No. 04-405
From Application of *Computer Inquiry* and	)	
Title II Common-Carriage Requirements	)	

COMMENTS OF VONAGE HOLDINGS CORP.

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Executive Summary

While Vonage supports the consideration of streamlining regulations where possible and where in the public interest to address specific problems, BellSouth's requested relief goes far beyond what could possibly be deemed necessary, prudent or lawful. In particular, BellSouth's overbroad request to exempt its broadband services from *all* Title II and *Computer Inquiry* requirements, including the requirement to provide nondiscriminatory access, would jeopardize competition and consumer choice, and would fail the statutory standards for forbearance.

The Commission has long recognized that one of its most crucial objectives and responsibilities is to promote innovation and competition for information services by seeking to assure that consumers are able to access the service providers, applications and content of their choice. The Internet revolution has been driven in large part by the openness sustained by the Commission's prescient decision a quarter-century ago in *Computer II* to prohibit telecommunications companies from discriminating in favor of their own information services. This core principle remains essential as an insurance policy against abuses of market power by vertically-integrated broadband providers such as BellSouth.

The Commission must carefully evaluate the impact of BellSouth's proposal on the market for IP-enabled services. BellSouth has a vested interest in discouraging or blocking consumers from using VoIP services provided by third parties. Vonage is particularly concerned that the requested relief could enable LECs to frustrate Vonage's ability to establish optimal 911 arrangements for its VoIP customers. Regardless of the fact that many Vonage customers use cable rather than DSL to reach Vonage, Vonage still must coordinate with and receive cooperation from the ILECs to implement an optimal 911 solution. BellSouth has already demonstrated its willingness and ability to attempt to leverage its strength in the broadband access market to suppress competition from VoIP providers by refusing to sell ADSL service to consumers who wish to utilize Vonage rather than BellSouth for voice services. Even though BellSouth claims to intend to continue voluntarily to enable its customers to reach certain third-party ISPs, its motives with respect to VoIP providers are clearly suspect.

BellSouth's petition is based largely on the premise that competition between incumbent LECs and cable companies is sufficient to protect consumers and their ability to access third-party ISPs. However, Commission precedent is clear that even the second-place firm in a duopoly is able to engage in anticompetitive practices. Moreover, for the many consumers and businesses that cannot purchase cable broadband, there is no question that BellSouth would be capable of raising prices, engaging in unreasonable practices, or denying access to certain information services providers in the absence of regulation.

BellSouth has overstated the costs of compliance with nondiscrimination requirements. While the provision of wholesale services involves cost, BellSouth has admitted elsewhere that these costs are worthwhile because they lead to increased revenues. BellSouth also fails to account for the fact that it would continue to incur at least some of these costs anyway, as it claims to plan to continue to offer wholesale access even absent regulation. Moreover, BellSouth's claim that it is strangled by inflexibility to offer specialized services is overstated. Every telecommunications service is subject to Title II's nondiscrimination requirements, and yet carriers are routinely able to develop specialized services and offerings to serve niche markets and individual customers. BellSouth's request to eliminate its Title II obligations goes far beyond anything that could be necessary to address legitimate concerns, if any, raised by BellSouth. BellSouth's requested exemptions from Title II and the *Computer Inquiry* and accounting safeguards are therefore contrary to the public interest and should be denied.

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As the nation's leading independent provider of IP-enabled voice communications services, Vonage Holdings Corp. ("Vonage") understands as well as anyone the need for the Commission's regulatory scheme to adapt to keep pace with changing technologies and markets. Vonage therefore is not opposed to the Commission's consideration of streamlining wholesale regulations where possible and where in the public interest to address specific problems. However, BellSouth's requested relief goes far beyond what could possibly be deemed necessary, prudent or lawful. In particular, BellSouth's overbroad request to exempt its broadband services from *all* Title II and *Computer Inquiry* requirements would jeopardize, rather than safeguard, competition and consumer choice, and would fail the rigorous standards for forbearance set forth by the Act. Even to the extent that problems exist, BellSouth's Petition fails to match these issues to appropriately-scoped requests for relief. Vonage therefore urges the Commission to deny BellSouth's petition.

I. THE COMMISSION SHOULD BE GUIDED BY THE GOALS OF ENCOURAGING THE DEVELOPMENT OF IP-ENABLED SERVICES AND PRESERVING PUBLIC SAFETY.

In the *IP-Enabled Services NPRM*, the Commission emphasized its goal of facilitating the transition to an IP-enabled telecommunications marketplace.[1] The Commission predicted that the rise of IP-enabled communications would lead to many revolutionary and beneficial changes including reductions in the cost of communication, innovation and individualization of services. Vonage agrees with the Commission's prediction. Vonage's IP-based voice services are rapidly redefining communications by offering consumers and small businesses a feature-rich, affordable alternative to traditional telephone service. In addition, Vonage recently announced that it is developing an IP-enabled video offering for consumers and small businesses.[2]

As in the *IP-Enabled Services Proceeding*, the Commission should be guided by the goal of facilitating and encouraging IP-enabled and other information services. The Commission should evaluate BellSouth's remarkably candid request that it be permitted to discriminate in favor of its own VoIP and information services, and against independent providers, and to cross-subsidize its own operations, in light of the obviously harmful impact such discrimination would have on the still nascent IP-enabled marketplace. As explained below, BellSouth could and would use the relief requested in its Petition to harm competitors. This, in turn, would retard the beneficial developments predicted in the *IP-Enabled Services NPRM.*

The Commission should be particularly alert to the impact on public safety that would be caused by the relief requested by BellSouth. BellSouth's request for sweeping deregulation

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[1] *IP-Enabled Services, WC Docket 04-36, Notice of Proposed Rulemaking,* ¶ 5 (rel. Mar. 10, 2004).

[2] "Vonage® Announces Partnership With Viseon To Develop Videophone," Press Release, Dec. 9, 2004, available at http://www.vonage.com/corporate/press_index.php?PR=2004_12_09_0.

would make it very difficult, or even impossible, to apply CALEA or the USA Patriot Act to network providers that have traditionally been subject to Title II. BellSouth's requested relief would arguably eliminate any obligation of ILECs to provide 911 access on reasonable terms and conditions to independent VoIP providers.

To protect its goals of facilitating IP-enabled services and of assuring public safety, the Commission should deny BellSouth's petition.

II. VOIP AND OTHER IP-ENABLED SERVICES VALIDATE *COMPUTER INQUIRY* SAFEGUARDS.

A. Providers and Users of VoIP Are Dependent on Telecommunications Provided by Third Parties.

As the Commission is aware from other proceedings,[3] Vonage's full-service VoIP products depend on the availability of underlying telecommunications facilities. First, Vonage customers must obtain a cable modem or DSL always-on broadband Internet connection from a telephone carrier, an ISP, or a cable company. Vonage's service does not perform optimally, if at all, over other types of Internet access such as satellite broadband or dial-up. Second, Vonage purchases services from telecommunications carriers for purposes of delivering calls to non-Vonage users. It is essential to the continued development of independent information services such as VoIP that third parties retain access to consumers over the facilities owned by telecommunications companies. Therefore, the Commission should consider carefully whether its decision in this and other proceedings will adequately protect consumers from attempts by the communications infrastructure companies to shut out third-party service providers in favor of their own service offerings.

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[3] *See e.g., Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 at ¶ 5 (rel. November 12, 2004).

Vonage does not have the resources to replicate a nationwide last-mile infrastructure that would be needed to access consumers over its own facilities. But more importantly, the public interest would be ill-served by a requirement that each and every type of service provider try to do so. The Internet revolution has been driven in large part by the fact that its open protocols allow everyone to reach consumers – and consumers to reach everyone who has a computer connected to the Internet – without establishing their own communications infrastructure. The Internet has blossomed by freeing the creativity and resources of the rest of the world to focus on the development of services, rather than redundant infrastructure -- if every eBay, Kazaa and Vonage had to build their own last-mile worldwide infrastructure to connect to their customers, there would be far fewer applications and far fewer resources available for the development of new ones. The credit for this success accrues in significant part to this Commission's prescient decision a quarter-century ago in *Computer II* to prohibit telecommunications companies from discriminating in favor of their own information services offerings.

While some of the details of the *Computer Inquiry* regulation may be ripe for reevaluation, the core principles of the existing scheme – consumer access to information services providers on an open and nondiscriminatory basis – remains an essential component of Chairman Powell's policy of "Net Freedom," in which "ensuring that consumers can obtain and use the content, applications and devices they want is critical to unlocking the vast potential of the broadband Internet."[4] The Chairman explained:

> Today, broadband consumers generally enjoy such internet freedom. They can access and use the content, applications and

[4] Remarks of Chairman Michael K. Powell at the Silicon Flatirons Symposium, "Preserving Internet Freedom: Guiding Principles for the Industry" (Feb. 8, 2004), see http://www.fcc.gov/commissioners/powell/mkp_speeches_2004.html.

> devices of their choice. This easy access includes some of the most promising new uses of broadband. For example, the head of the National Cable and Telecommunications Association recently stated that cable modem providers would not block traffic from competing Internet voice providers, such as Vonage. … Nevertheless, [the Commission] must keep a sharp eye on market practices that will continue to evolve rapidly. … Preserving "Net Freedom" … will serve as an important "insurance policy" against the potential rise of abusive market power by vertically-integrated broadband providers.

As demonstrated below, BellSouth is precisely one of these "vertically-integrated broadband providers" that has the ability to deny consumers' Net Freedom to access content, applications and devices of their choice. In considering BellSouth's petition, the Commission must take extreme care that it does not surrender the future of innovation and development of consumer broadband services and applications to the mercy of the broadband infrastructure companies. Consumers should not be left to depend on a duopoly to define the entirety of our broadband future. Chairman Powell, in explaining his vote not to approve the proposed DirecTV-EchoStar merger, reasoned that a duopoly market cannot be expected to deliver the benefits of innovation and unfettered competition to consumers:

> At best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands.[5]

Relatedly, Commissioner Abernathy has explained:

> [O]ur *Computer II/III* rules played a key role in fostering a robustly competitive ISP market in which consumers can choose from a wide range of providers. Thus, while I intend to examine the record with an eye toward streamlining wholesale regulations

[5] *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee*, CS Docket No. 01-348, Hearing Designation and Order, FCC 02-284 (rel. Oct. 18, 2002) ("*Echostar-DirectTV Merger Order*"), Separate Statement of Chairman Michael K. Powell.

> where possible, I am committed to preserving regulations to the extent necessary to safeguard competition and consumer choice.[6]

These principles articulated by Chairman Powell and Commissioner Abernathy provide the context within which BellSouth's request to exempt itself from the entirety of Title II and the *Computer Inquiry* obligations must be examined, and ultimately, rejected.

B. IP-Enabled Broadband Services Will Compete With BellSouth's Service Offerings and Thereby Increase Its Incentive For Discriminatory Conduct.

BellSouth has a vested interest in discouraging or blocking consumers from using VoIP services provided by Vonage or other third parties. VoIP competes with BellSouth's existing local and long-distance offerings, and would also compete with future BellSouth VoIP services. For the first time in American history, the number of incumbent LEC circuit-switched access lines recently has been in decline,[7] particularly as a result of mobile telephone services and the replacement of second lines for dial-up Internet access with broadband. While alternative VoIP providers have so far not been a major cause of ILEC line losses, Vonage now serves nearly 400,000 "lines" and will significantly compete with traditional incumbent voice services. Thus, BellSouth has strong incentives to thwart provision of alternative VoIP service. ILEC incentives to suppress VoIP could grow especially as Vonage and other VoIP providers launch new IP-enabled services, such as video IP, that offer new revenue opportunities and that will lure more customers away from traditional circuit-switched services.

BellSouth has demonstrated its willingness and ability to attempt to leverage its strength in the broadband access market to suppress competition. For example, BellSouth refuses to sell

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[6] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Notice of Proposed Rulemaking, Separate Statement of Commissioner Kathleen Q. Abernathy (February 14, 2002).

[7] *See, e.g.*, *Trends in Telephone Service*, Industry Analysis and Technology Division, Wireline Competition Bureau (rel. August 7, 2003) at Table 7.1.

ADSL service at any price to end-user consumers who do not also purchase BellSouth's circuit-switched traditional voice service. The purpose of BellSouth's DSL tying policy is to discourage consumers from using alternative voice services such as VoIP or wireless services. *See* WC Docket No. 03-251, Comments of Vonage Holdings Corp., January 30, 2004. Far from seeking to conceal this practice, BellSouth has argued that restricting consumer choice in this manner is in the public interest.

BellSouth's proposal to eliminate all of Congress' and the Commission's safeguards that protect and promote competition for information services -- which have served as a cornerstone of the nation's Internet policy for a quarter-century -- marks its attempt to open another front in its effort to limit consumer choice. BellSouth itself has explained elsewhere that "Closing the market to a competitor not only unfairly punishes that competitor, but also punishes consumers because it limits their choice and thus increases price and delays availability."[8] Yet BellSouth's proposal would strengthen its hand to attempt exactly that result. Even before the Commission has completed its consideration of whether it can or should establish alternative safeguards, BellSouth's proposal would give free rein to its ability to harm competitors by permitting it to establish special relationships with its own IP-enabled operations, deny them to independent providers or even to deny access altogether to alternative providers.

C. Forbearance Would Impair the Availability of New VoIP 911 Solutions.

Vonage recently completed a successful E911 trial with the Rhode Island state public safety 911 system. This trial established the feasibility of a 911 solution that enables Vonage to transmit both the VoIP caller's location and callback number to appropriate emergency service personnel. Under this solution, developed in cooperation with Intrado, Inc. (the nation's leading

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[8] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Comments of BellSouth Corporation at 46 (April 8, 2003).

provider of 911 systems and services), a Vonage subscriber dialing 911 has their address and telephone number placed in the Automatic Location Information ("ALI") server. A special key in the signaling then permits the PSAP operator to pull the customer's address and telephone number from the ALI server. This solution will give every Vonage customer located in Rhode Island (including those who choose other area codes) E911 service on par with traditional telephone service.

The ability of broadband IP-enabled telephony providers to obtain and craft a solution for 911 access is of course very important for achieving and maintaining public safety goals. Parity with traditional telephone services in terms of 911 access is also important for a viable competitive market for IP-enabled voice services. However, the Vonage-Intrado 911 solution is unfortunately only available in Rhode Island because the 911 infrastructure there is owned by the state, and state authorities chose to cooperate with Vonage. In other states, by contrast, where significant, essential elements of the 911 infrastructure are under the control of incumbent telephone companies, Vonage has been unable to implement this solution because ILECs, including BellSouth, will not cooperate. SBC's failure to offer 911 access in its recent TIPTop tariff, supposedly designed to benefit VoIP providers, is symptomatic of the ILECs' steadfast refusal to cooperate with VoIP service providers to provide parity in 911 access.[9] *Regardless of the fact that many Vonage customers use cable rather than DSL to reach Vonage, Vonage must coordinate with and receive cooperation from the ILECs to implement an optimal 911 solution.* Once the ILECs develop a 911 solution for their own VoIP services, they would be required by the *Computer Inquiry* safeguards to make it available on a nondiscriminatory basis to independent service providers such as Vonage. It is therefore troublesome that BellSouth is

[9] Letter from Patrick Doherty, SBC to Marlene H. Dortch, Secretary, Transmittal No. 1425, November 24, 2004.

seeking a license to discriminate and refuse to enable Vonage to access effective 911 solutions by requesting an exemption from Title II and the *Computer Inquiry* rules.

Vonage is concerned that the forbearance requested by BellSouth would facilitate its ability to discriminate against its VoIP rivals and in favor of its own operations in provision of 911 functionality. There are numerous ways in which BellSouth could do so. Pricing, requirements to interconnect through intermediaries, and spurious security requirements are likely examples. BellSouth's petition totally fails to address the potential for 911 discrimination. This is one of many examples in which the sweeping relief BellSouth has requested is far broader than necessary to address the alleged shortcomings of the existing regulatory scheme. The Commission should deny BellSouth's petition because, if for no other reason, it would permit BellSouth to undermine the public safety by discriminating against its VoIP competitors.

Therefore, while BellSouth portrays the Title II and *Computer Inquiry* requirements as anachronisms, they remain highly relevant to the emerging market for IP-Enabled Services. In analyzing whether BellSouth's petition has satisfied the statutory standards for forbearance, the Commission should therefore consider the implications of BellSouth's requested relief for the IP-enabled services market, including VoIP.

III. BELLSOUTH'S PETITION FAILS TO MEET THE STATUTORY STANDARDS FOR FORBEARANCE.

The forbearance provisions of Section 10 provide:

> the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or

> telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

The legal framework for the Commission to evaluate BellSouth's Section 10 petition is firmly established under Commission and D.C. Circuit precedent. In particular, the test under section 10 is conjunctive. The Commission must "deny a petition for forbearance if it finds that *any* one of the three prongs is unsatisfied."[10]

The Commission has made it clear that, under Section 10, it "cannot assume, that absent [the provision or regulation] market conditions or any other factor will adequately ensure that the charges, practices, classifications and services ... are just and reasonable and not unjustly or unreasonable discriminatory."[11] BellSouth's petition, however, is long on assumption, and short on empirical evidence to support its claims that Vonage and its customers, or other ISPs, have sufficient intermodal competitive alternatives so that eliminating the *Computer Inquiry* and accounting safeguards and the panoply of Title II regulation would not lead to the imposition of anti-consumer and anti-competitive practices and rates in the broadband market. In fact, as discussed below, there is at best a duopoly between cable and incumbent broadband services which is insufficient to assure reasonable terms and conditions of service.

The statute further requires the Commission to tailor its forbearance findings to specific markets or specific carriers. Section 10 directs the Commission to forbear only "in any or some"

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[10] *CTIA v. FCC*, 330 F.3d 502, 509 (emphasis supplied) (upheld FCC denial of forbearance petition under 10(a)(2) without addressing other two provisions under 10(a)).

[11] *1998 Biennial Regulatory Review - Review of ARMIS Reporting Requirements*, Report and Order, Petition for Forbearance of the Independent Telephone and Telecommunications Alliance, CC Docket 98-10, Fifth Report and Order, 14 FCC Rcd 11443 ¶ 32 (1999).

of the markets where the petitioner shows the forbearance criteria are met. In other words, the statute expects that the petition and the Commission's analysis will be sufficiently granular and will not make broad sweeping regulatory pronouncements where narrower findings are more appropriate. This approach is consistent with judicial guidance regarding the required standards for assessing entry barriers in the local telecommunications market.[12] To assess properly whether a carrier possesses market power, the Commission has found that "the proper market aggregates those consumers with similar choices regarding a particular good or service in the same geographic area."[13] For purposes of BellSouth's petition, for example, if the Commission determines that regulation is no longer necessary to protect consumers who can choose between an ILEC's DSL service and cable modem service, it must consider separately whether the same is true for the many consumers, and the VoIP providers needing access to 911 and the PSTN, that lack access to cable broadband services but do have access to DSL service.

A. Regulatory Safeguards Remain Necessary to Assure that ILEC Charges, Practices, Classifications, and Regulations Are Just and Reasonable and Not Unjustly Discriminatory.

Vonage believes that the best way to protect competition in the information services market is to ensure that information service providers have multiple wholesale alternatives to the telecommunications inputs that are necessary to provide their information services. As the Commission observed in the *Computer III Remand Further Notice*:

> Competition in the local exchange and exchange access markets is the best safeguard against anticompetitive behavior. BOCs are unable to engage successfully in discrimination and cost misallocation to the extent that competing ISPs have alternate sources of access to basic services. Stated differently, when other telecommunications carriers, such as interexchange carriers (IXCs)

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[12] *USTA I*, 290 F.3d 415 (D.C. Cir. 2002).

[13] *WorldCom v. FCC*, 238 F.3d 449, 461, *citing* NYNEX *Corporation, Transferor and Bell Atlantic Corp. Transferee*, Memorandum Opinion and Order, 12 FCC Rcd. 19,985, 20,016 ¶ 54 (1997).

> or cable service providers, compete with the BOCs in providing basic services to ISPs, the BOCs are less able to engage successfully in discrimination and cost misallocation because they risk losing business from their ISP customers for basic services to these competing telecommunications carriers.[14]

Accordingly, when the Commission reviewed the *Computer Inquiry* safeguards in 1999, it determined that "until full competition is realized, certain safeguards may still be necessary."[15] BellSouth's petition effectively claims that competition between the incumbent LEC and cable company for broadband transmission services in the residential market, each with significant market power in their primary line of service, and each with a strong economic interest in limiting competition from third parties, somehow amounts to a "fully competitive market" that assures that ISPs will have sufficient alternate sources for consumer access such that no carrier would be able to prevent consumer access to any independent information services provider. The evidence and common sense prove the contrary.

BellSouth primarily argues that it lacks market power because it provides broadband to fewer residential customers than do cable companies, and that therefore it has no ability to sustain unreasonable or discriminatory rates or practices, or to deny and frustrate access to third party information services not only in the residential market but in any market.[16] In the first place, Commission and other precedent are clear that even the second-place firm in a duopoly is able to engage in anticompetitive practices such that consumer welfare is not assured by competition between the two duopolists. Second, BellSouth does wield market power,

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[14] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket 95-20; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements, CC Docket 98-10, Notice of Proposed Rulemaking, 13 FCC Rcd. 6040 (1998).

[15] *Id.* at ¶ 7.

[16] BellSouth Petition at 17.

particularly with respect to 911 access and also over the many consumers and businesses that do not have access to cable broadband. Finally, evidence of BellSouth's market share is not by itself sufficient to demonstrate that BellSouth has met the forbearance criteria. Instead, the Commission should look to other indicia, such as those evaluated in its non-dominance cases, to consider BellSouth's ability in the absence of regulation to suppress competition and consumer choice.

1. Duopoly Competition is Insufficient to Protect Vonage or its Customers.

Before analyzing the insufficiency of duopoly for consumer protection, it should be noted that there are no reliable prospects in the near-term for a third, substitutable broadband delivery option that would be capable of supporting state-of-the-art VoIP services. Fixed wireless technologies, satellite broadband and Broadband over Power Line ("BPL"), are neither sufficiently substitutable nor commercially available to discipline ILECs anticompetitive behavior in the broadband market. According to the Commission's own data, the combined market share for broadband technologies other than cable or DSL has decreased since 1999. These statistics show that fixed wireless and satellite combined now have 1.3% of the market compared to 2.8% in 1999,[17] and analysts expect little movement upwards.[18] Other technologies such as WiMAX, mobile wireless and BPL have not been deployed on a generally available commercial basis.[19] Vonage on a continuous basis evaluates new alternatives for broadband

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[17] *High Speed Services for Internet Access: Status as of December 31, 2003*, Tables 1-4, (June 2004).

[18] *See* Gartner, Inc., *Consumer Telecommunications and Online Market*: United States 2002-2007 (Dec. 2003) at 3.

[19] See *IP-Enabled Services*, WC Docket 04-36, Competition in the Provision of Voice over IP and IP-Enable Services, attached to Letter to Marlene H. Dortch from Evan Leo, Counsel for BellSouth, SBC,

access that would enable it to provide service to its customers, but to date none of these alternative technologies have sufficiently matured to reliably support Vonage's IP-enabled services. The Commission cannot seriously entertain the theory that these technologies can restrain the ILECs' anti-competitive behavior should the Commission eliminate the Title II and *Computer Inquiry* safeguards.

The duopoly of cable and ILEC DSL is not sufficiently competitive to impact the rates and practices of the duopolies. Instead, Commission precedent and relevant antitrust case law requires three or more relatively equal size market participants offering substitutable services over their own facilities before a market can be deemed sufficiently competitive to protect consumers. The Commission has recognized that even if a retail market has multiple competitors, a single firm that controls essential facilities can exercise market power by leveraging its control of those facilities to "increase[e] its rivals' cost or by restricting its rivals' output.[20] The Commission has specifically found that ILECs possess such market power and thus "have the ability and incentive to use their bottleneck facilities to engage in cost misallocation, unlawful discrimination or a price squeeze."[21] Similarly, in addressing the ILEC ability to exercise its market power in the broadband market, the Commission found that because ILECs "compete with other providers of advanced services they have an incentive to

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Qwest and Verizon, (filed May 28, 2004) at A2, A13. WiMax faces significant obstacles before the Commission can asses whether it might emerge as a serious broadband competitor. *See* Bear Stearns, *US Wireline/Wireless Services* (June 2004) at 5. WiMax will have "limited impact on wireline carriers in the near term.") While power companies are experimenting with BPL, deployment is limited to trial markets, and it is unclear whether powerline infrastructure will be capable of supporting a service truly substitutable for cable or telco broadband. Analysts expect BPL to have only 220,000 subscribers nationwide by 2008. *See* In-State/MDR, *Reaching Critical Mass* at 22. While the RBOCs hype mobile wireless 3G competition, RBOC Report A18, analysts suggest the technology is immature, Bear Stearns, *U.S. Wireline/Wireless Services* (June 2004) at 47; with slow speeds and high costs, *Everything Over IP*, at 41 Table 12.

[20] *LEC Classification Order*, 12 FCC Rcd 15756 ¶ 83 (1997).

[21] ITTA Forbearance Petition, 14 FCC Rcd 10816 ¶ 7 (1999).

discriminate against companies that depend on them for evolving types of interconnection and access arrangements necessary to provide new service to consumers."[22]

The Commission has clearly applied its three-or-more competitor policy in the past as a precondition of removing regulatory safeguards. In its order that effectively derailed the proposed merger between the two rival satellite television firms, the Commission stated "existing antitrust doctrine suggests that a merger to duopoly .... faces a strong presumption of illegality.[23] The Commission opposed the merger on the basis that for "the vast majority of consumers, it would result in a reduction in the number of competitors from three to two or from two to one," and that "such a drastic reduction in the number of competitors and concomitant increase in concentration create a strong presumption of significant anticompetitive effects."[24] Chairman Powell wrote separately to emphasize that a duopoly market "would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers," and that such concentrated markets "inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands."[25]

Antitrust jurisprudence provides further support for this approach. In a duopoly, both firms, regardless of the allocation of market share have an incentive to exercise market power and have the incentive and means to maintain prices above competitive levels because "firms in a concentrated market ... in effect share monopoly power by recognizing their shared economic interests and their interdependence with respect to price and output decisions."[26] A "durable

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[22] *Ameritech-SBC Merger Order*, 14 FCC Rcd 14712 ¶ 202 (1999).

[23] *Echostar-DirectTV Merger Order*, ¶ 103.

[24] *Echostar-DirectTV Merger Order*, ¶ 99.

[25] *Echostar-DirectTV Merger Order*, Separate Statement of Chairman Powell.

[26] *Brooke Group v. Brown & Williamson*, 509 U.S. 209, 227 (1993).

duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices."[27] For example, the DC Circuit reversed a lower court's finding that the merger of the second and third largest firms in a three-firm baby-food market would increase the ability of the merged firm to compete with the number one firm. Likewise, in *FTC v. Staples*, the court enjoined the merger of two competing office supply superstores where the merger would have left only one superstore competitor in 15 markets and only two competing superstores in 27 markets.[28] The court found that the merged entity "would allow Staples to increase prices or otherwise maintain prices at an anticompetitive level."[29] These cases are directly on point. The Commission cannot rely on a duopoly to restrain anticompetitive practices and pricing, especially in the face of evidence that the party seeking forbearance has the incentive, ability and intent to frustrate the ability of consumers to access competing IP-enabled services.

2. BellSouth Has Monopolist Power in Many Markets Where Cable is Unavailable.

Even if the Commission found that duopoly competition between ILECs and cable companies is sufficient to protect residential customers who have a choice between the two, it must separately analyze the effect of BellSouth's requested relief on consumers and businesses who do not. As an initial but crucial matter, as discussed above, in most states the ILECs are Vonage's only option for access to 911 systems. Even though many Vonage customers use cable modems to access Vonage's service, Vonage must receive cooperation from the ILEC to offer an optimal 911 solution. Second, cable broadband does not reach all homes served by BellSouth

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[27] *FTC v. Heinz*, 246 F.3d 708, 725 (D.C. Cir. 2001).

[28] *FTC v. Staples*, 970 F. Supp. 1066, 1081 (D.D.C. 1997).

[29] *Id.* at 1082.

DSL, and reaches hardly any businesses.[30] The Georgia PSC found that BellSouth has market power even in a combined cable/DSL broadband market, as DSL leads cable in Georgia, and BellSouth held a "substantial majority" of the DSL lines in its region.[31] The Commission noted that BellSouth's own testimony acknowledged that "a substantial number of Georgia customers have access to BellSouth DSL but not to cable broadband."[32] The Florida Commission similarly had before it evidence, presented by BellSouth itself, indicating that fewer than 1% of small business customers could obtain cable broadband services, and that for the foreseeable future, cable modem providers are unlikely to deploy broadband access to approximately 25% of their total residential footprint.[33] While numbers vary by market, it is clear that there are and will continue to be consumers who cannot purchase cable broadband service.

There also is virtually no competition from cable outside the mass-market, where the ILECs continue to control vital bottleneck last mile transmission facilities. Cable has little if any viable presence in the small business market, losing market share in 2003 and reaching only 4.2% of the remote office market.[34] Thus it is not surprising that analysts conclude "DSL

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[30] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Ex Parte Presentation of Florida Digital Network, Inc. (October 21, 2002) at 11-12 and Exhibit 3 (citing evidence presented by BellSouth in the Florida Digital-BellSouth arbitration that cable broadband service is obtained by less than 1% of small and medium sized businesses, and that, for the foreseeable future, cable broadband providers were unlikely to extend the availability of broadband service to approximately 25% of their residential customers.).

[31] *See Docket 03-251,* BellSouth Petition, Exhibit 13 (October 21, 2003 Georgia PSC Order at 10-16).

[32] *See id.* at 10.

[33] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Ex Parte Presentation of Florida Digital Network, Inc. (October 21, 2002) at 11-12 and Exhibit 3 (citing evidence presented by BellSouth in the Florida Digital-BellSouth arbitration that cable broadband service is obtained by less than 1% of small and medium sized businesses, and that, for the foreseeable future, cable broadband providers were unlikely to extend the availability of broadband service to approximately 25% of their residential customers.).

[34] Yankee Group, Cable and DSL Battle for Broadband Dominance, (February 2004) at 4-5.

operators dominate the U.S. [small business] broadband and enterprise remote-office broadband market."[35] BellSouth's petition conveniently ignores any distinction between the mass market and enterprise markets. For these consumers and businesses, there is no question that BellSouth is capable of raising prices, engaging in unreasonable practices, or denying access to certain broadband information services providers such as Vonage.

3. Other Indicia of BellSouth's Market Power

Market power is typically defined as a firm's ability to "exclude competition or control prices."[36] The law makes clear that the assessment of whether BellSouth has market power in the broadband delivery does not fall solely on BellSouth's market share.[37] Rather, as the Commission and the courts have explained, a broader inquiry is required. In *AT&T v. FCC*, the D.C. Circuit reversed the determination that a firm's market power was dispositive where the Commission did not address other factors enumerated in nondominance cases.[38]

These factors include demand and supply elasticities; that is, how consumers could substitute other services for the service in question, or how new entrants and existing competitors could add capacity to serve consumers that would seek alternatives to overpriced ILEC broadband. The Commission examines supply elasticity to "determine the ability of alternative suppliers in a relevant market to absorb a carrier's customers if such a carrier raised the price of its service by a small but significant amount and its customers wished to change carriers in

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[35] *Id.* at 4.

[36] *United States v. E.I. duPont Nemours & Co.*, 351 U.S. 377, 391 (1956).

[37] *United States v. General Dynamics*, 415 U.S. 486, 498 (1974).

[38] *AT&T v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001).

response."[39] The Commission examines two factors in assessing supply elasticity, the "supply capacity of existing competitors" and "entry barriers."[40] As the Commission is well aware, supply elasticity in the residential broadband market is low. The first factor is "whether existing competitors have or can relatively easily acquire significant additional capacity" in a relatively short time period.[41] Other than cable companies in the residential market, no other player is even able to deliver comparable broadband connectivity.

Demand elasticity is also constrained. Demand elasticity refers to "the willingness and ability" of "customers to switch to another ... service provider or otherwise change the amount of services they purchase ... in response to a change in the price or quality of ... service."[42] First, as discussed above, many of BellSouth's 2 million[43] DSL customers have no comparable broadband alternative. But even for those who could obtain alternative broadband service, there exist many disincentives for a customer to change broadband providers:

- loss of their BellSouth email addresses and web hosting services;
- payment of early termination charges to BellSouth;[44] and
- difficulty of the service termination and reinstallation processes, which can result in downtime; acquisition of new modem equipment; site visits by network

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[39] *COMSAT Corp., Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier,* 13 FCC Rcd 14083, 14,139 ¶ 78 (1998) ("*COMSAT Non-Dominance Order*").

[40] *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order,11 FCC Rcd 3271, 3293 ¶ 38 (1995) ("*AT&T Non-Dominance Order*").

[41] *AT&T Non-Dominance Order*, ¶¶ 57-58.

[42] *Comsat Non-Dominance* Order, ¶ 71.

[43] *See* BellSouth Celebrates 2,000,000 DSL Service Customers, BellSouth Press Release (Dec. 6, 2004), viewed at http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=48307.

[44] *See* http://www.fastaccess.com/content/consumer/conditions.jsp?a=b (viewed Dec. 20, 2004).

technicians; and reconfiguration of software, hardware, LAN and home networking equipment, PC settings, user passwords, etc.

Cumulatively, these consequences of changing broadband providers may in the mind of some customers outweigh the advantages of escaping an unreasonable or discriminatory practice by their existing broadband carrier. The desire to keep an existing email address can be as powerful an incentive for the *status quo* as the ability to keep a telephone number, an issue that the Commission has addressed with its number portability regulations. In addition, some consumers may believe that DSL is preferable to cable modem service. BellSouth itself urges customers to compare DSL with cable modem service, reminding them that "FastAccess Service provides a dedicated connection to your home to the BellSouth DSL network. Cable modem service shares a connection with other cable modem subscribers."[45]

In short, the supply and demand elasticities confirm that BellSouth and the RBOCs retain market power in the broadband market, regardless of the cable company market share in the non-rural residential market. As long as the companies that own broadband transmission facilities can exercise market power, they will exercise that market power to control downstream markets that rely on those transmission faculties, especially in their core markets. Absent regulation, the RBOCs could take further steps to frustrate consumers' ability to access third-party VoIP providers. For example, as noted in the IP-Enabled Service proceeding, there is now "technology that exists to enable network operators to recognize the data packets that move across their system and prioritize them. ILECs ... could block or assign a lower priority to

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[45] *See* https://www.fastaccess.com/content/consumer/common_questions.jsp (viewed Dec. 20, 2004).

packets from competing IP-enabled service providers."[46] The *Computer Inquiry* safeguards exist precisely to prevent dominant carriers from leveraging their control over bottleneck facilities into dominance in the information service market. The record before the Commission reveals that these regulations remain necessary as an insurance policy against vertically-integrated broadband providers such as BellSouth.

B. The Requested Forbearance Would Harm Consumers.

Section 10(a)(2) provides that the petitioner must demonstrate that the enforcement of a regulation or statutory provision is not necessary for the protection of consumers.[47] Under this criterion, the Commission may deny a forbearance petition where there remains a "strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve with the disputed regulation."[48] The D.C. Circuit rejected any suggestion that the term "necessary" in Section 10(a)(2) means that the regulation at issue is "absolutely essential or indispensable."[49] In other words, a regulation may be "necessary" even though acceptable alternatives have not been exhausted.[50]

Using this framework for analysis, the Commission retained the wireless local number portability rules despite its finding that the absence of number portability for wireless subscribers was not a total barrier to entry.[51] In that case, the Commission's predictive judgment that

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[46] *IP-Enabled Services, WC Docket 04-36,* Comments of Enterprise Comm. Ass'n at 9.

[47] 47 U.S.C. § 160(a)(2).

[48] *CTIA*, 330 F.3d at 512.

[49] *Id.* at 510.

[50] *Id.*

[51] *Id.* at 512.

consumers would be more likely to switch carriers if their numbers were portable was sufficient justification for denying the forbearance.[52]

The Commission may also deny a forbearance petition when it finds there is the potential that competition will be reduced or rate increases may result from elimination of the provision or regulation.[53] In the *1999 Biennial Review Depreciation Order,* the Commission determined that:

> Forbearance of the depreciation prescription process could potentially trigger large increases in a carrier's depreciation expenses which could turn result in unwarranted increases in consumer rates. These increased depreciation expense and consumer rates would likely to continue for many years until robust competition curtails the ability of the incumbent LECs to secure these rates from consumers.[54]

BellSouth contends the *Computer Inquiry* rules "affirmatively harm consumers" by raising costs, impeding competition and stifling investment. However, on balance, none of these contentions are compelling:

1. The Alleged Costs of the Title II and *Computer Inquiry* Safeguards Are Overstated.

BellSouth complains that it suffers significant unnecessary costs from being required to offer underlying transmission to third-party ISPs. Yet BellSouth elsewhere contends that the Commission need not be concerned about the ability of third parties to access consumers because BellSouth would continue to do so even absent a legal obligation.[55] It is unclear what portion of the supposed costs of the *Computer Inquiry* rules BellSouth would continue to incur regardless as a result of its voluntary provision of access to third parties. In addition, BellSouth fails to

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[52] *Id.*

[53] *See* 1998 Biennial Regulatory review—review of deprecations requirements for incumbent local exchange carriers, 15 FCC Rcd 242, ¶ 59 (1999).

[54] *Id.*

[55] BellSouth Petition at 28.

mention that the costs of providing access to third party service providers are at least partly offset by increased revenues. As BellSouth has explained previously to the Commission:

> A network is a very expensive asset to build and maintain. Networks are designed to handle various capacity levels, usually in excess of current expected demand, *i.e.*, it is cheaper to build a network with excess capacity and allow subscribers to grow to fit the network as opposed to expanding the network capacity every time a subscriber is added. In fact, since most network equipment is purchased in discrete sizes or lumps, adding capacity to the network one subscriber at a time is not possible. *Thus, economics of the network favor recovering the cost of the network over as many customers as possible.* This allows the carrier to achieve positive margins faster as the cost per customer is lowered. Both wholesale and retail customers add demand to the network. Thus, network costs are assigned to all offerings. Consequently, a carrier achieves greater economic benefit by obtaining more customers to share the fixed costs of the network, regardless of whether the customers are buying wholesale or retail services.[56]

Therefore, the alleged *net* costs to BellSouth of compliance with Title II and the *Computer Inquiry* rules appear to be overstated. And even if BellSouth's figures were accurate, the more relevant question is the overall cost to consumers if the safeguards are eliminated. For all the reasons stated in these comments, those costs would be enormous.

BellSouth also complains that the existing regulatory scheme impairs its ability to develop individualized service offerings, such as its development of RBAN for Earthlink. However, even if the Commission accepted BellSouth's allegations *in toto*, that still would not justify a complete exemption from Title II. All telecommunications services are subject to Title II's nondiscrimination requirements, yet carriers are routinely able to develop specialized services and offerings to serve niche markets and individual customers. If something specific about the *Computer Inquiry* rules adds a layer of complication that is unnecessary, the

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[56] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Comments of BellSouth Corporation (May 3, 2002) at 22 (emphasis added).

Commission should evaluate it. But BellSouth's request to eliminate its nondiscrimination, Title II, and accounting obligations goes far beyond anything that could be necessary to address legitimate concerns, if any, regarding BellSouth's ability to serve niche markets.

Therefore, Vonage does not oppose consideration of streamlining or modifications that would address specific concerns raised by BellSouth, so long as the Commission reaffirms the fundamental and essential principle that wireline broadband transmission services, offered separately pursuant to Section 202 and the *Computer Inquiry* rules, will remain available to third party service providers on a nondiscriminatory basis.

2. Title II and *Computer Inquiry* Safeguards Promote Competition.

Contrary to BellSouth's contentions, nondiscrimination safeguards do not deter but promote competition, by providing the essential regulatory underpinnings that will protect against ILECs' ability and incentive to disadvantage competitors. As stated elsewhere in these comments, BellSouth could potentially seriously harm independent VoIP providers. Therefore, the Commission should conclude that forbearance would harm consumers by harming the competition that could bring lower prices and greater service choices.

3. Title II and *Computer Inquiry* Safeguards do not Stifle Investment.

BellSouth goes to great length to suggest that the Commission should grant the petition because § 706 favors the promotion of broadband deployment as a statutory goal. However, even assuming forbearance would promote investment, the forbearance provisions of § 10 of the Act do not permit the imputation of Section 706 goals in derogation of the explicit statutory goals of § 10, namely protecting consumers and enforcing the mandates of the Act regarding just and reasonable prices and nondiscrimination. Moreover, Section 706 does not afford the

Commission an independent grant of forbearance authority.[57] Therefore, even if it were the case that the safeguards stifled investment, the Commission may not use Section 706 to ignore the statutory standards for forbearance. Because BellSouth has not met the standards for forbearance, the Commission may not grant the petition based on Section 706 goals.

C. Forbearance Would Not Serve the Public Interest.

The Commission may only forbear if the petitioner can demonstrate that the provision or regulation is no longer in the public interest. Because the requested forbearance would permit ILECs to harm competitors and consumers, it clearly would not serve the public interest to grant the BellSouth petition.

Moreover, central to the public interest analysis in section 10(a)(3) is the impact of the proposed forbearance on competition among telecommunications carriers. Section 10(b) compels the Commission to "consider whether forbearance from enforcing the provision or regulation will enhance or promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[58] The Commission cannot grant forbearance relief under 10(a)(3) when removing a regulation will be harmful to "competition among providers of telecommunications services." BellSouth's petition presents exactly those kinds of harms.

BellSouth claims that its petition advances the public interest, referring to "goals" the Commission purportedly enunciated in the Cable Modem declaratory ruling now on appeal to the Supreme Court in *Brand X*. BellSouth further contends that "no regulatory rule is necessary to

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[57] *See Association of Communications Enterprises v. FCC*, 235 F.3d 662, 666 n.7 (D.C. Cir. 2001) (noting Commission's conclusion that § 706 is not an independent grant of authority to forbear, but instead only provides an instruction that the Commission should utilize Section 10's forbearance authority in the context of advanced services).

[58] 47 U.S.C. § 160(b).

ensure independent ISPs access to BellSouth's network."[59] Vonage wishes this were true, but the evidence in the record, in the DSL tying case, and in Vonage's own experience demonstrates the contrary. At a minimum, the Commission must deny BellSouth's petition in order to preserve its jurisdiction to protect consumers. In 2001, the Commission reaffirmed that:

> The internet service providers require DSL service to offer competitive internet access service. We take this issue seriously, and note that all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced service providers. Indeed, the Commission has already found that where there is an incentive for a carrier to discriminate unreasonably in its provision of basic transmission services used by competitors to provide enhanced services, section 202 acts as a bar to such discrimination. In addition, we would view such discrimination in pricing, terms, or conditions that favor one competitive enhanced service provider over another or the carrier, itself, to be an unreasonable practice under § 201(b) of the Act.[60]

The Commission has consistently applied this cornerstone principle even to carriers that are non-dominant and lack any market power. There is certainly no precedent for the Commission to deviate from that principle in this instance, particularly for a carrier or class of carriers that retains significant market power.

BellSouth claims that if freed from all Title II and *Computer Inquiry* safeguards it would negotiate "private carriage" arrangements with individual ISPs "tailored" to the unique circumstances of particular ISPs. There is no restriction, however, in the *Computer Inquiry* rules or Title II that deny BellSouth this ability. Neither Title II nor the *Computer Inquiry* rules prevent BellSouth from developing a individualized offerings. Instead, it appears likely that the individualized treatment BellSouth has in mind is in choosing which independent information

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[59] BellSouth Petition at 28.

[60] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket 96-61; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket 98-183, Report and Order, FCC 01-98 (rel. March 30, 2001), at ¶ 46.

services providers it wishes to try to keep consumers away from. Congress clearly did not intend for the Commission to use forbearance to provide a license for discrimination. BellSouth's petition is contrary to the public interest and should be denied.

IV. CONCLUSION

Vonage has pioneered in the provision of VoIP service. Service options and prices offered by Vonage are in many respects superior to the BOCs traditional service offerings. For the reasons stated in these comments, the relief requested in BellSouth's petition could seriously threaten the marketplace success and attendant benefits to consumers that Vonage has been able to provide. The Commission should dismiss or deny the above-captioned petition.

Respectfully Submitted,

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